Supreme Court, U.S.
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No. 05-851

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES,

Petitioner,

v.

CEDRICK CLEVELAND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE CHIEFS IN SUPPORT OF THE PETITION

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INTEREST OF *AMICUS CURIAE*

Established in 1873, International Association of Fire Chiefs (IAFC) is a network of nearly 13,000 chief fire and emergency officers. The members of IAFC are leading experts in fire fighting, emergency medical services, terrorism response, hazardous materials spills, natural disasters, search and rescue, and public safety legislation. IAFC's purpose is to provide career and volunteer chiefs, chief fire officers and managers of emergency services organizations throughout the international community with information, education, and services, and to enhance their ability to protect citizens from the devastation of fire and other environmental, natural and technological emergencies.

Pursuant to Supreme Court Rule 37.2(a), IAFC has conferred with the parties regarding the filing of this brief *amicus curiae*, and both have consented to its filing. The parties' letters of consent are on file with the clerk.[1]

IAFC respectfully submits this brief in support of the petition for a writ of certiorari filed by the City of Los Angeles. The *amicus* is uniquely positioned to assist this Court in this case because its members are leaders and managers of fire departments across the nation and, therefore, IAFC can attest to the practical implications of the Ninth Circuit's decision. Further, IAFC has an obvious, fundamental interest in an issue that directly impacts the effective provision of fire and emergency services across the nation.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* declares that no counsel for any party to this case authored this brief in whole or in part, and that no entity or person, other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF REASONS FOR GRANTING THE PETITION

In 1999, IAFC supported an amendment to the Fair Labor Standards Act (FLSA) providing a statutory definition of an "[e]mployee in fire protection activities," which became law on December 9, 1999. 29 U.S.C. § 203(y). Prior to this time, public fire departments faced uncertainty as to whether paramedics trained as firefighters (dual function firefighter/paramedics) would be covered by the partial overtime exemption applicable to employees engaged in fire suppression—particularly when they primarily respond to medical emergency calls. The regulations interpreting the FLSA were difficult to decipher, and many inconsistent court decisions exacerbated their ambiguity. In this context, the 1999 amendment to the FLSA provided much-needed clarification that the partial overtime exemption for firefighters applies to dual function firefighter/paramedics.

The Ninth Circuit's decision, however, undermined the clearly-articulated legislative intent to include dual function firefighter/paramedics within the special overtime provision for employees engaged in fire protection. The legislative history of the 1999 amendment indicates that Congress sought to clarify the law so that state and local governments would not be needlessly exposed to tremendous financial liability. Unless this Court accepts this case to correct the Ninth Circuit's misinterpretation, public agencies providing public safety functions will not be able to rely on § 203(y) and will again be exposed to significant fiscal risk. Because of this financial deterrent, state and local governments may be forced to reduce or eliminate utilization of dual function firefighter/paramedics—a consequence that would negatively impact their ability to provide effective and flexible emergency response services to the public. For these reasons, IAFC respectfully urges this Court to grant review of the decision below.

REASONS FOR GRANTING THE PETITION

I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION CONTRAVENES THE LEGISLATIVE INTENT OF 29 U.S.C. § 203(Y) TO CLARIFY THAT DUAL FUNCTION FIREFIGHTER/PARAMEDICS ARE INCLUDED IN THE PARTIAL OVERTIME EXEMPTION FOR EMPLOYEES ENGAGED IN FIRE PROTECTION

In 1985, Congress recognized that holding public agencies that provide fire and police protection accountable for strict overtime liability under the FLSA had the potential to significantly deplete scarce fiscal resources—particularly because of the unique shift arrangements routinely utilized by these agencies.[2] To ease the financial impact of the FLSA overtime provisions, Congress added a partial exemption to the FLSA overtime requirement for employees engaged in fire protection and law enforcement activities. 29 U.S.C. § 207(k).

In reliance on the 207(k) exemption, public fire departments computed FLSA overtime based on work periods that extended beyond the typical seven day, forty hour workweek. Many public sector fire departments also applied the partial overtime exemption to paramedics who were cross-trained as firefighters and had the responsibility to provide fire protection services alongside single function firefighters during prolonged work periods. Fire departments provide most of the emergency medical response services for cities and localities across the country, and, therefore, fire

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[2] Fire departments routinely operate using shift arrangements that require personnel to work more than 40 hours in a strict 7 day period. In recognition of this system, the partial overtime exemption to the FLSA allows public fire departments to set up work periods from 7 to 28 days in duration and to pay overtime on the hours worked beyond the maximum prescribed for the particular work period.

departments greatly benefit from the ability to use a single shift arrangement system for all first responders.

In several localities across the nation, however, fire department employees principally engaged in providing emergency medical services claimed that the partial overtime exemption was wrongfully applied to them. Complicated regulations issued by the U.S. Department of Labor (DOL) interpreting the FLSA did not provide a clear solution.[3] The series of conflicting court decisions resulting from these lawsuits cast doubt on whether state and local governments were in compliance with the FLSA when using the special overtime process to compensate dual function firefighter/paramedics—and eroded the original intent of the exemption to allow fire departments optimum flexibility in scheduling. *See e.g. Lang v. City of Omaha*, 186 F.3d 1035 (8th Cir. 1999); *West v. Anne Arundel County*, 137 F.3d 752 (4th Cir. 1998); *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir. 1997); *Alex v. City of Chicago*, 29 F.3d 1235 (7th Cir. 1994); *Justice v. Metro. Gov't. of Nashville*, 4 F.3d 1387 (6th Cir. 1993); *O'Neal v. Barrow County Bd. of Comm'rs*,

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[3] The DOL regulations provide a four-prong test for an employee engaged in fire protection. 29 C.F.R. § 553.210. The first three criteria require that the employee be employed by a fire department, be trained to the extent required by State statute or local ordinance, and have the "legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type." *Id.* The fourth prong requires the employee to perform either required fire protection activities or "incidental nonfirefighting functions." *Id.* Additionally, courts applied another regulation stating that the performance of "nonexempt work which is not performed as an incident to or in conjunction with their fire protection ... activities" in excess of 20 percent of the total hours worked in the applicable work period would defeat the partial overtime exemption. 29 C.F.R. § 553.212. The regulations do not specify, however, whether work related to medical emergencies should be characterized as "exempt" work that is "incidental" within the meaning of Sections 553.210 and 553.212, or "nonexempt" work within the meaning of Section 553.212.

980 F.2d 674 (11th Cir. 1993); *Wouters v. Martin County*, 9 F.3d 924 (11th Cir. 1993); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991). The decisions against public fire departments resulted in millions of dollars in back pay awards.

In 1999, Congress decided to remedy the confusing decisions that stripped fire departments of their ability to apply the partial overtime exemption to dual function firefighter/paramedics. With bipartisan support, Congress passed an amendment to the FLSA providing a statutory definition of an "[e]mployee in fire protection activities," which was endorsed by IAFC and others and became law on December 9, 1999. Specifically, Congress defined an "[e]mployee in fire protection activities" as:

> "[A]n employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—
>
> (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
>
> (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk."

29 U.S.C. § 203(y).

Despite respondents' assertion that the 203(y) definition was designed to apply only to firefighters who periodically engage in other work in addition to fire services, the statute *expressly delineates* that a "paramedic," "emergency medical technician," or "ambulance personnel" may be covered under the definition. *Id.* Thus, cross-trained firefighter/paramedics would be covered under the statute.

The lawmakers' comments on this bill reveal that the legislative intent was to affirm unequivocally that dual function firefighter/paramedics are employees engaged in fire protection activities under the 207(k) partial overtime exemption. In a statement supporting the legislation, then-Chairman of the Committee on Education and the Workforce, Representative William F. Goodling, commented:

> Many cities and local governments employ emergency medical services personnel who receive training, and work schedules and maintain levels of preparedness, which is similar to that of fire fighters. In the past, these types of employees fit within the [20]7(k) overtime exemption. In recent years, however, some courts have narrowly interpreted the [20]7(k) exemption and held that emergency medical services personnel do not come within the exemption because the bulk of their time is spent engaged in non-fire protection activities. These lawsuits have resulted in state and local governments being liable for millions of dollars in back pay, attorney's fees and court costs.... H.R. 1693 would clarify this area of the law by specifying the duties of employees who would be eligible for the limited overtime exemption. *The bill would ensure that fire fighters who are cross-trained as emergency medical technicians ... would be covered by the exemption, even though they may not spend all of their time performing activities directly related to fire protection.*

Markup of H.R. 1693, A Bill to Clarify the Overtime Exemption for Fire Fighters (Nov. 3, 1999) (statement of Representative William F. Goodling, Chairman, H. Comm. on Educ. and the Workforce) (emphasis added).

As expressly stated in the legislative history, H.R. 1693 was designed "to make clear that fire fighters who

perform fire fighting duties are covered by the exemption, *regardless of the number of hours they spend in responding to Emergency Medical Services calls*," and to "ensure[] that unreasonable burdens are not placed on fire departments for hours worked." 145 Cong. Rec. S15007 (daily ed. Nov. 19, 1999) (statements of Senators Edward M. Kennedy and Jack Reed) (emphasis added). Likewise, the history indicates that under the 203(y) definition, "paramedics who are cross-trained/dual role firefighters, and work in a fire department and have the responsibility to perform both fire fighting and emergency medical services" are undoubtedly to "be treated as firefighters" for purposes of the partial overtime exemption. *Id.*

Congress sought to assure state and local governments that they could apply the partial overtime exemption to dual function firefighter/paramedics without risk of a prospective penalty. Representative Robert Ehrlich, the original sponsor of the bill, emphasized that judicial decisions refusing to characterize dual function firefighter/paramedics as employees engaged in fire suppression were incorrectly decided and unnecessarily imposed extreme costs on public agencies for overtime back pay. 145 Cong. Rec. H11500 (daily ed. Nov. 4, 1999) (statement of Representative Robert Ehrlich).

Although a major impetus for passing § 203(y) was to eradicate the ambiguity created by confusing court rulings, the Ninth Circuit reinstated the problem by misinterpreting § 203(y)—despite Congress' clear-cut mandate to the contrary. Among other problems with this analysis, the Ninth Circuit ignored the express statutory language including "paramedic[s]," "emergency medical technician[s]," and "ambulance personnel" within the definition of "employee engaged in fire protection activities." The court instead narrowly focused on the definition of the word "responsibility," and incorrectly concluded that the dual function firefighter/paramedics did not have the "responsibility" to engage in fire suppression, even though they could be ordered to do so. Public sector fire departments were reassured by Congress that they could rely

on the 1999 amendments to utilize dual function firefighter/paramedics under the partial exemption scheme. Now, without intervention by this Court, state and local governments again will be faced with uncertain financial liability for this practice—a result which would defeat the unambiguous resolution that Congress intended.

II. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION WILL IMMEDIATELY EXPOSE PUBLIC AGENCIES TO SIGNIFICANT FINANCIAL LIABILITY AND DETER PUBLIC AGENCIES FROM UTILIZING DUAL FUNCTION FIREFIGHTER/PARAMEDICS, TO THE DETRIMENT OF THE PUBLIC

Most of the nation's fire departments offer some level of emergency medical services, and many employ first responders who are trained to provide both fire suppression and emergency medical services. In 2004, the Journal of Emergency Medical Services (JEMS) conducted a survey of the 200 most populous cities in the United States, and determined that of the 200 cities included in the survey, 90 percent reported that fire service personnel provide medical first response. JEMS, 200 CITY SURVEY (2004). This system allows for flexible and effective deployment of staff, thereby enhancing the emergency response capabilities of the nation's fire and emergency services. The 1999 amendment to the FLSA provided a clear-cut process by which fire departments could design their systems to include all first responders as employees engaged in fire protection in the same shift arrangement.

In the wake of the Ninth Circuit's decision, state and local governments have been deprived of the clarity intended by the 1999 amendment to the FLSA. The practical consequence of this uncertainty is that public fire departments are likely to limit utilization of paramedics trained in fire suppression skills in order to avoid potential